IN RE ARBITRATION BETWEEN:

IOWA STATE POLICE OFFICERS COUNCIL

and

STATE OF IOWA, DEPARTMENT OF NATURAL RESOURCES

DECISION AND AWARD OF ARBITRATOR
IOWA PERB 10-GA-057

JEFFREY W. JACOBS

ARBITRATOR

June 18, 2010

IN RE ARBITRATION BETWEEN:

State Police Officers Council,

and

State of Iowa, DNR

DECISION AND AWARD OF ARBITRATOR
Iowa PERB Case # 10-GA-057
Paul Kay grievance

APPEARANCES:

FOR THE UNION:

Susanna Brown, General Counsel
Paul Kay, grievant

Kim Perlstein, Director Des Moines County Conservation Dep't
Lester Nieland, Retired Conservation Officer
Craig Lonneman, DNR Officer/Union Steward
Mike Johnstone, Sherriff of Des Moines County

FOR THE STATE:

Karen Kienast Espinosa, DAS/HRE
Randy Edwards, former Chief of Law Enforcement Bureau, DNR

PRELIMINARY STATEMENT

The hearing in the above matter was held on April 26, 2010 at the DNR Offices in the Wallace Bldg., 502 East Ninth St., Des Moines, Iowa. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated May ttdt, 2010.

ISSUES PRESENTED

The parties stipulated to the issue as follows: Did the State have just cause to terminate the grievant? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2007 through June 30, 2009. Article IV, section 2 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Iowa PERB.

PARTIES' POSITIONS

STATE'S POSITION:

The State's, position was that there was just cause to terminate the grievant for his actions on February 21, 2009. In support of this the State made the following contentions:

1. The Grievant was a Conservation Officer with the Department of Natural Resources (DNR) and joined the Iowa DNR in August 2005. Conservation Officers are certified peace officers; and are responsible for application, interpretation and enforcement of laws related to hunting, fishing and other conservation related matters. These officers are certified peace officers have the authority to issue citations, make arrests and serve warrants and are frequently called on to testify in court.

2. The State further asserted that while the grievant's job performance while on duty is not in question and is generally regarded as good, he does not have a clean record. He was previously terminated for off-duty drunk driving, known as an OWI, Operating While Intoxicated, under Iowa law. Pursuant to a settlement agreement, he was reinstated subject to a 30-day suspension. E should therefore have been well aware of the need to stay out of trouble both on and off duty.

3. That settlement agreement provides in relevant part as follows:

> This settlement arose out of a situation in which the Grievant was terminated from employment on February 20, 2008. Bascd on this situation, the parties agree to the following:
>
> The State will rescind the termination and remove the termination letter from the Grievant's personnel file. The termination letter will be replaced with a notice of discipline suspending the Grievant for thirty (30) days. The notice of suspension will be removed from the Grievant's personnel file eighteen (18) months from the date of his return to employment provided there are no further violations of the State Substance Abuse policy in the interim.

4. The State asserted that this language is clear and means that the grievant had to abstain form any further violations of the Substance Abuse Policy in order to have the letter of suspension removed and that any further violations would result in his discharge from employment.

5. The State further asserted that a 30-day suspension is "the last step" in any progressive disciplinary seheme and that the clear message sent to the grievant was that any further violations would result in his termination. The State disagreed strongly with the suggestion that any other sorts of violations would result in discipline at the beginning of the progressive disciplinary step and that the grievant knew well that he was on very thin ice.

6. The State further asserted that the operative facts that led to the grievant's most recent termination are not in dispute. He and another conservation office entered the Catfish Bend Casino late in the evening of February 21, 2009. Sometime after 3:00 a.m., well after the time aleohol service ends in Iowa, the Grievant's companion went bchind the bar and helped himself to two glasses of beer. The Grievant did nothing to stop this or intervene in any way. The State furthcr noted that both the grievant and his companion simply engaged in conversation even though it was obvious that the companion had not paid for the beer and that it was well after hours.

7. The grievant also drank from the glass on at least one occasion and perhaps twice and was thus not a casual observer in this scenario as the Union suggests. Moreover, the two were eventually ejected from the casino by security personnel and told not to return that night. This was both a scrious violation of law and the two were cventually charged with 5th degree theft, and a serious matter for the department, the two were both law enforcement officers and their actions brought discredit and embarrassment to the department.

8. The State further asserted that the grievant is frequently in contaet with other law enforeement personnel, county attorneys and other prosecutors and the Courts and that is actions seriously undermined his credibility and ability to enforce the law and to testify in Court if necessary.

9. The gist of the State's case is that the grievant was already subject to a 30-day suspension and that even thought the contract calls for progressive discipline it does not define how or under what precise eircumstances that will apply

10. Moreover, there is no progressive disciplinary step beyond 30 days so that it is obvious that any further violation would almost by definition bc termination. The grievant was under a clear warning that any further violations within 18 months would result in his discharge. Here it was only 9 months until he committed the offense that occurred on February 21, 2009, obviously well within the 18 month time frame called for by the settlement agreement.

11. The State argued that he terms of the settlement agreement are clear and unambiguous; there are no trick clauses here and the grievant and the Union knew what would happen to him if he violated the Substance Abuse policy again. Moreover, even if one assume that this was not a violation of the actual Substance Abuse policy, it was a very serious matter that calls for termination in its own right even if one adopts the Union's claim that the grievant should "be allowed to go back to square one" in terms of the progressive disciplinary process. He was already subject to a 30-day suspension – the only logical next step is termination; not a lesser penalty as the Union suggests. .

12. The State countered the Union's claim that this was not a Substance Abuse violation by pointing out that the essential facts here were about alcohol – the grievant drank beer that was not paid for and purloined well after bar closing time. The State asserted that even though the grievant was not intoxicated his actions involved alcohol, which is certainly covered by the essence of the State's Substance Abuse policy.

13. The State asserted that the Union's claim regarding the de minimus aspect of the grievant's actions misses the point. This is quite different from an off-duty law enforcement officer who might witness someone driving too fast or running a stop sign without incident – the grievant was complicitious with and participated in this scenario. That he only drank one sip is therefore not relevant – that he drank any and that he did nothing to stop this or to intervene even though he was there and clearly knew what was going on was wrong is the point.

14. Further, the fact that he was acquitted of the charge of 5th Degree Theft is also not controlling. The State asserted that the fact that he was charged so blemishes his standing with the law enforcement community that he can no longer be trusted to act as a law enforcement officer. Moreover, an acquittal in a Court of law is controlled by a far higher standard of proof and does not speak to whether there was a violation of policy, only to whether there was a violation of law. Here the termination is controlled by the State's policy and the clear terms of the prior settlement agreement. The Court made no ruling on that and this proceeding is therefore not governed by the result in the criminal courts.

15. The State further asserted that the grievant's actions brought discredit and embarrassment to the department and compromised his ability to act as a law enforcement officer. The Union's claim that "hardly anybody knew about it" or words to that effect are disingenuous. He was prosecuted very near where his work area was located in southeast Iowa and it can be assumed that the Court knew about it. Certainly the judge who presided over his trial did as well as the prosecutor who brought the action. These are the very same people the grievant might well have to work with to enforce the law or to prosecute someone for violations of Iowa law in the future. The fact that he is working in a similar capacity now also does not control this result.

16. Further, the fact that the other officer was given a lesser discipline does not control this result either. That officer worked for a different department and, more importantly, was not subject to a prior 30-day disciplinary suspension that called for termination if he violated the Substance Abuse Policy. The situations are thus very different and should be treated that way by the arbitrator.

17. The essence of the State's argument is that the grievant's poor judgment cannot be ignored or minimized. There is nothing in the settlement agreement that mandates a new progression of discipline for future infractions. The level of discipline in this matter was appropriate give the grievant's actions and his past record.

The State seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION

The Union's position was that the there was not just cause for the termination in this matter. In support of this position the Union made the following contentions:

1. The Union acknowledged many of the essential facts of the ease, including the allegations that the grievant was present at the Catfish Bend Casino while a friend, also a law enforcement officer, went behind the bar at around 3:00 a.m., got several glasses of beer and that the grievant drank one small sip of that beer at one point during the evening. The Union disputed that he drank two sips and noted that initially he declined to drink any despite being offered some.

2. The Union argued that the grievant is not merely a "good" DNR offieer but an exceptional officer whose work performance is above reproach as attested to by several witnesses representing several different ageneies and levels of government.

3. The Union acknowledged the prior discipline but disputed the interpretation of the Settlement Agreement and asserted there was no language requiring termination for another offense of any kind. The Union further argued that the agreement called only for the removal of the suspension after 18 months, not for his termination. That document is not a classic "last ehanee agreement" that calls for termination upon a finding of a violation of any kind. In fact there was no agreement mandating termination even if there was a violation of the Substanee Abuse poliey.

4. Further, the Union asserted that the settlement agreement and the speeific paragraph rclied upon by the State only applied if there was a Substance Abuse policy violation. The Union asserted most strenuously that even if one accepts all of the factual allegations stemming form the February 21, 2009 incident as true, that does not arise to the level of a "Substance Abuse policy violation." The Substance Abuse policy applies, not surprisingly, to *Substance Abuse* and not to any and all possible violations of every policy the State has. Here what the grievant did does not arise to "Substance Abuse" under any definition of that term. The Union even pointed to standard dictionary definition of that term and asserted that nothing of that sort occurred on the facts presented here.

5. The Union pointed to the provisions of the Substance Abuse Policy itself, which provides in relevant part as follows:

> SUBSTANCE ABUSE POLICY FOR EXECUTIVE BRANCH EMPLOYEES:
>
> OTHER ACTIVITIES INVOLVING SUBSTANCE ABUSE AND WARRANTING REPRIMAND, SUSPENSION OR TERMINATION
>
> Absent mitigating circumstances, any of the following actions shall result in reprimand, suspension, or a summary discharge. ...
>
> 2. The employee engages in off-duty misconduct that either: (I) impairs the employee's ability to perform his or her job function; (2) substantially effects the public's perception of the employee's ability to perform his or her job function; or (3) causes substantial damage to the reputation of the Employer. The employee may be subject to reprimand, suspension, or termination even if no arrest or conviction results from the off-duty misconduct.

6. As noted above, the very premise of this language is that it relates to Substance Abuse. There was no showing whatsoever that there was any Substance Abuse of any kind by any definition. The sate is simply trying desperately to apply a painful interpretation of that policy to this case in order to build up their claim that the grievant should be fired.

7. Thus, the argument goes, even if one accepts the pained interpretation of the settlement agreement claimed by the State, no Substance Abuse violation occurred here. Accordingly too, the more general progressive discipline policy would apply and termination is obviously not called for on a first offense of this nature.

8. The Union pointed to the general policy found in the collective bargaining agreement regarding progressive discipline. That language provides in relevant part as follows:

> ARTICLE IV: SECTION 10. Discipline and Discharge
>
> The parties recognize the authority of the Employer to suspend, discharge, or take other appropriate disciplinary action against employees for just cause. When an employee is disciplined, the Employer will state in writing the violation and the manner in which the violation occurred. An employee who alleges that such action was not based on just cause may appeal a suspension or discharge, taken by the Employer beginning with the third step of the grievance procedure. Written reprimands shall begin with the first step of the grievance procedure.

> There shall be no suspension of an employee which results in a loss of pay or benefits until an initial investigation has been conducted. No employee shall incur a loss of pay until such disciplinary action is approved by either the Patrol Area Commander, Division of Criminal Investigation Assistant Director, Fire Marshal, Director of Division of Narcotics Enforcement of the Department of the Public Safety, or Chief of Bureau of Law Enforcement, Chief of Field Operations, Department of Natural Resources, or in their absence a supervisor of equal or higher position within the Agency. The Employer reserves the right to suspend an employee with pay pending the outcome of the initial investigation. Any disciplinary action or measure imposed upon an employee may be processed as a grievance through the grievance procedure. **An Employer shall not discipline an employee without just cause, recognizing and considering progressive discipline where applicable.** (Emphasis added).

9. The Union argued that the terms of the settlement do not apply as the State would have it and that the language of Article IV does apply to require progressive discipline without regard to whether there has been a prior discipline. Each scenario facts thus rests on its own facts – here that applies to require the arbitrator to view this case as if it were the first discipline and to impose discipline consistently with the progressive disciplinary steps.

10. The Union further argued that the quantum of proof necessary especially in a case involving termination must be by "clear and convincing" evidence and not the much lower "preponderance of the evidence" standard. Here that requires a high showing indeed that the grievant's action arose to the level of a disciplinable offense. The Union asserted that there was no showing whatsoever that the grievant's actions somehow brought disrepute to the Department. Indeed, the Union argued, the witnesses from various agencies with whom the grievant worked then, and now, testified that the grievant's reputation is as good as ever and that he continues to perform very similar duties in the same area of the State of Iowa very effectively.

11. Further, the only reason given for the termination was that he violated the Substance Abuse Policy and that this was therefore a terminable action under the settlement agreement. The Union argued that this was not only not a violation of Substance Abuse, as noted above, but that there was no showing at all that the grievant was ineffective at his job. The Union pointed out that he in fact did his job for several months after this incident; after he was charged with 5th degree theft and after the State was well aware of all of this.

12. There was no evidence that his ability to perform his duties were in any way compromised during this time. Further, there was a tacit agreement to leave the grievant in his job until the criminal case was completed yet the State decided to terminate him even before the matter went to trial.

13. The Union pointed out that after a full trial in the Courts, the grievant was aequitted of the offense and that this should be taken into account by the arbitrator here. The Judge found that there was no theft and that the grievant at most took one small sip of beer.

14. The Union further asserted that the State's main argument, i.e. that the grievant's actions brought disrepute and embarrassment to the department and undercut the grievant's ability to perform his job, were never even investigated by Mr. Edwards much less established by the evidence. The Union argued that such speculation cannot form the basis of a termination.

15. Further, the Union asserted that tin reality, the grievant's reputation as an effective law enforcement officer was not at all harmed by this event and that those with whom he works respect and even revere him. The general public still views him as a State Conservation Officer and many are unaware that he is no longer with the State but rather with the County.

16. Moreover, the Union pointed out that there was no "nexus" between his off-duty actions and his job as a DNR officer and thus cannot form the basis of a termination. The Union asserted that the State must show that there was actual or potential adverse publicity and its potential to damage the Department's image or that there was some possible refusals to work with the grievant by co-workers or that there was a showing that the grievant no longer had the ability to perform his job properly. Here there was no such showing and, as noted above, the overwhelming evidence showed that the grievant is well respected by the very people we worked with before and after this incident. The Union further noted that there was no investigation at all by the State to determine of any of the above impacts had or even potentially occurred – it was simply speculation by the head of the department.

17. Finally, the Union asserted that the State has not applied its rules consistently and noted that tbe other officer involved in this matter, i.e. the one who actually took the beer and drank the beer, was given only a 10-day suspension in this matter. He even pleaded guilty to the theft charge. The grievant took perhaps one small sip of it, never once took the beer from the bar taps, and was acquitted of the charges against him in a Court of law. In addition, the Union pointed out other cases of similar conduet where the officers involved were not terminated but rather were given lesser forms of discipline instead and raised a disparate treatment argument on behalf of the grievant here.

The Union requests that the Arbitrator sustain the grievance, order immediate reinstatement and make the grievant whole for any lost wages and contractual benefits.

DISCUSSION

The essential facts were not disputed. The grievant is a State conservation officer and was hired by the Department of Natural Resources in August 2005. He was assigned to Des Moines County in southeast Iowa. The grievant's job performance has always been quite good and there was no evidence of any on-duty misconduct of any kind that reflected poorly on his record; indeed the record was quite to the contrary. It was the off-duty conduct that is the subject of this matter.

The facts giving rise to the instant case are as follows: On February 21, 2009 the grievant and a friend, Mr. Steele, who is a State Park Ranger, also a position in a law enforcement capacity, entered the Catfish Bend Casino in Burlington Iowa at approxiinately 2:00 a.m. The two men then entered a bar and gaming area and at approximately 3:00 a.m. where Mr. Steele went behind the bar and poured a cup of beer for himself. He did not apparently pay for this beer. Further, this was well after bar closing time in the ate of Iowa so the bar area was ostensibly closed to the public. There was no bartender or Casino employee in that room when Mr. Steele purloined the beer.

Mr. Steele offered a sip to the grievant but he refused at that time. At no point did the grievant ever walk behind the bar nor was he observed on the video that was introduced into evidence from the security cameras at the casino, pouring himself a glass of beer. The grievant was observed to then sit at gaming tables to play some sort of video poker game. Mr. Steele got up multiple times to refill his glass. At one point the grievant did take a small sip of beer from the cup while he was playing games and there was evidence of only one such sip.[1]

Eventually a security guard for the casino confronted the two and while there was no audio on the tape, it was apparent that he inquired as to how and why they had the beer. They were ejected from he casino and told not to return that night. There was no evidence on this record that the casino personnel knew that the grievant and his companion were law enforcement officers nor was there any evidence they knew who the two worked for. Thus there was no evidence here that the State or any of its departments were implicated or brought into disrepute by these actions that night.

The grievant and Mr. Steele were eventually both charged with 5th degree theft under Iowa law. Mr. Steele apparently plead guilty to these charges and received a 10-day suspension from his department. The grievant pealed not guilty to the charges and was acquitted in a Court of law after a trial. Both parties made much of this acquittal. While an acquittal is one piece of evidence it is not controlling as to the result here. The question before the Court was guilt or innocence under Iowa law and statute. The question here is whether there was just cause for termination because of a violation of State policy or the terms of the settlement agreement between the parties, as will be discussed below.

[1] There was considerable dispute at the hearing about whether the grievant took one or two sips of beer that night. On this record there was evidence of only one but it should also be noted that the number of sips did not affect the ultimate outcome here much. As will be discussed further in the body of this decision, he took one and, more to the point, was there while Mr. Steele was clearly taking the beer after hours and without payment.

The grievant was not immediately removed from his position. The record reflects that he was allowed to remain in his job for several months following the incident despite the facts that the State knew of it and of the essential facts of the incident as early as February 25, 2009. The grievant was interviewed about the incident and the record reflects he was both contrite and forthright in that interview. He gave truthful testimony in the interview about this incident to his supervisors and told them what happened.

Following that interview, the grievant was informed that discipline would wait until after the criminal trial. DNR management did not contact any law enforcement personnel, citizens, county attorneys or any witnesses in the grievant's district to determine whether he was capable of continuing his employment effectively. Mr. Kay continued to carry out his regular duties as a conservation officer for from April 9, 2009 until June 5, 2009. There was some evidence to suggest that the State became frustrated when the criminal trial was postponed and that this contributed to the decision to terminate him when they did. There was also some evidence to suggest that it is not uncommon for criminal trials to be postponed for a few weeks. The trial was held on July 7, 2009.

On this record there was little if any evidence to suggest that the incident of February 21, 2009 compromised the grievant's ability to perform his job nor was there sufficient evidence to demonstrate that the department was in any way compromised by it. In fact there was little evidence at all to show that the general public or the other Court and law enforcement personnel saw the grievant in any different light than had been the case prior to the Catfish bend incident. He remains well regarded and respected in the community in which he works.

Moreover, as will be discussed somewhat more below, there was little showing of any investigation by Mr. Edwards regarding the allegation that there was such a compromise to the grievant's credibility. It was clear that he did not seek out other law enforcement personnel in the area in which the grievant works nor any of the Court personnel in that area either to determine if his assumptions about the impact the catfish bend incident would have. On this record, this sparse evidence to support the allegations was a strong factor in the outcome.

The Union asserted that the grievant's actions that night were de minimus and can be simply dismissed as an inadvertent lapse in judgment in taking a small sip of beer. Two things can be said about the Union's position. First, the assertion that this was not a violation of the State's Substance Abuse policy had considerable merit. The fact that this incident involved alcohol very indirectly does not make this a de facto Substance Abuse situation. It is clear from the language of the Substance Abuse policy that the threshold factor in its application is – Substance Abuse. There was no Substance Abuse here. This is mad even stronger when viewed in the context of the earlier OWI offense, whieh certainly was an instanee of Substance Abuse. This of eourse is relevant here due to the terms of the settlement agreement, which by its terms requires a Substance Abuse in order for any of its terms to apply.

Second, having said that, the Union's claim that the grievant is wholly innocent rang somewhat hollow as well. While he elearly did not take the beer he was more than a mere speetator in this affair. This is thus a very different case from the hypothetieals discussed at the hearing regarding a law enforeement officer's duty to respond to crimes when they see them even if they are off duty. Without delving into the depths of what those rights and responsibilities are, suffice it to say that this scenario presented a very different ease than one in whieh an off duty officer might witness a minor traffic violation for example. Watching an incident go by is very different than participating in it.

Here the grievant was in the room with a companion who surreptitiously drank several glasses of beer without payment knowing full well that no one was "watching" and that it was well after service hours in Iowa. While the grievant only took one sip, the essential feature of this scenario is that he was at least a passive if not active participant in this and did nothing to stop it or to advise his friend that what he was doing was A) likely a crime and B) was equally as likely being recorded. This was after all a casino where it is somewhat common knowledge that literally everything is being filmed by a security camera somewhere. This of course was a factor that weighed in favor of the State's case in this matter.

Mr. Edwards was quite forthright when asked if he would have terminated the grievant if this had been the only offense on this record. Clearly, it would not have been and he so indieated. Clearly too, the other officer, Mr. Steele, who also works for the State in a different ageney, was given a 10-day suspension. There was no evidence of what his prior reeord was or of his overall performance but it was clear he was not fired and was given a 10-day suspension.[2] The erux of this case turns on the settlement agreement and whether it now requires termination as the result of what happened at Catfish Bend.

In January 2008, the grievant was arrested for OWI. On February 20, 2008, the Department terminated him, but when the criminal ease was dismissed, the termination was reseinded. The Union and the State entered into a settlement agreement in September 2008 that stated that the termination letter was to be removed from the grievant's file and replaced with a 30-day suspension. The settlement agreement further stated that if there were no further violations of the State Substance Abuse Poliey within eighteen months of the agreement, the suspension would be removed from the file.

As noted above, the relevant terms of that agreement provided as follows:

> This settlement arose out of a situation in whieh the Grievant was terminated from employment on February 20, 2008. Based on this situation, the parties agree to the following:
>
> The State will reseind the termination and remove the termination letter from the Grievant's personnel file. The termination letter will be replaeed with a notice of discipline suspending the Grievant for thirty (30) days. The notice of suspension will be removed from the Grievant's personnel file eighteen (18) months from the date of his return to employment provided there are no further violations of the State Substanee Abuse poliey in the interim.

There was evidence that the parties diseussed what this meant at the time it was negotiated but apparently there was no clear understanding about what the terms of this agreement meant as applied to the future. Both parties had very different views of how it would affect future instances of misconduct.

[2] There was also some evidence of other officers who committed other types of offenses, some more serious than this, who also were not terminated. However, there was no evidence in those other cases of a settlement agreement similar to that which appears on this record.

The State asserted that it meant that there was nothing that would support an inference that any infraction other than a violation of the Substance Abuse Policy would dictate that the Grievant start a new disciplinary progression. The State further asserted that the settlement agreement absolutely applies to this situation and that the grievant's action were in violation of the Substance Abuse policy and therefore of the settlement agreement itself. Further, the State argued that the grievant's actions constituted a clear violation of the State's Substance Abuse poliey since it involved alcohol and that it brought embarrassment and discredit to the grievant and to the department as a whole. As noted above, the grievant's aetions here did not rise to the level of a violation of the State's Substance Abuse policy. Thus by the terms of the settlement agreement there was no violation of that part of the agreement. The question is thus whether the grievant's actions on their won warrant termination or some other form of discipline on this record.

The State further asserted that even if this was not a violation of the Substance Abuse poliey, any further misconduct of any kind must result in the grievant's termination since a 30-day suspension is the very last step in any progressive disciplinary scheme. The argument was that the grievant and the Union cannot simply ignore the fact that the grievant has a 30-day suspension on his record and even though this incident when viewed in a microcosm by itself might not have resulted in his discharge – this ineident is part of a larger picture and of a grievant who has a very real problem staying out of trouble when off duty.

The union too argued that the settlement agreement "says what it says" and asserted that it does not require termination even if there had been a Substance Abuse violation. It requires that the termination letter be taken out of the grievant's file if there was not a violation of that policy within 18 months of the date of the agreement. The Union argued that each case of alleged misconduct must thus be judged on its own unique facts and the appropriate remedy applied based solely on those facts as they arise at the time.

There was some merit to the Union's assertions that the settlement agreement itself is not a true "last chance agreement" where typically there is a requirement of termination upon a finding of a certain type of offense or policy violation. No such language is found in the terms of this agreement. The Agreement provides that if there are no violations of the State's Substance Abuse policy the termination letter will be removed from the grievant's file. It does not "require" a termination. Further, even if it does, the clear terms would require a violation of the State's Substance Abuse policy – and there was insufficient evidence to establish that on this record.

Still though, the State asserted that a 30-day suspension is a very heavy penalty and that even under a progressive disciplinary scheme the next logical step is termination even if there is no showing of a violation of the Substance Abuse policy. That was a somewhat thorny question since it was clear that the grievant had been suspended for 30-days pursuant to that earlier agreement and was thus under the threat at least that any further violations of policy would be treated sternly. As will be discussed below, this was a factor taken into account in detemining the appropriate remedy to be applied o these facts but they did not on this record compel a discharge for this grievant.

Several things mitigated in favor of reinstatement. First, there is the grievant's obvious excellent work record. Both parties agreed that his work performance is exemplary and that he is well regarded by everyone with whom he works. There were not issues whatsoever with his on the job performance.

Second, and significantly, there is the respect with which he is regarded by the law enforcement personnel in the area of the State of Iowa in which he works. It was significant that several individuals made the trip from the far reaches of southeast Iowa to Des Moines to testify; some for a few minutes, and that they were overwhelmingly in favor of the grievant retaining his job. The clear preponderance of the evidence showed that the grievant is very well regarded by co-workers and peers in his area and that there was virtually no adverse impact on his credibility or effectiveness due to this incident.

Moreover, there was as noted above a paucity of evidence of any actual investigation or factual support for the State's allegations that the catfish Bend incident undereut the grievant's ability or job performance. The reeord revealed too that in fact he kept his job for many weeks following this incident and that the trial, in which he was acquitted, did nothing to undermine his ability to act as a DNR officer. This fact weighed heavily in favor of reinstatemcnt since there was no showing of any adverse impacts during the time he stayed on after this incident occurred

There was however the nagging issue of his obvious complicity in this ineident, albeit in a somewhat passive way, and how this demonstrates a lack of good judgment by someone who by all accounts does and should have known better than the stick around while his buddy poured beers for himself after hours in a casino without paying for it. There was also the clear fact that he already had a 30-day suspension on his record.

The Union's elaim that this should go back to the beginning of the "standard" progressive disciplinc step was unsupportablc on this reeord. While the terms of the settlement agreement do not require a termination on thcse facts; each case does rise and fall on its own at least on this unique record, the grievant's actions were troubling and cannot be dismissed with a mere warning or short suspension. As the State noted in its Brief: "The Grievant had been amply warned that there would be no tolerance for any further shenanigans on his part during the next eighteen months. To his grcat peril he did not heed that warning."

Here the most appropriate remedy bascd on the facts, the settlement agreement and the grievant's prior record is a reinstatement without back pay or accrued contractual bcncfits. The arbitrator struggled with the remedy since it is apparent that the grievant is so well liked and has such a good work pcrformance record. Without thc earlier 30-day suspension the result here might well have been different but clearly that was part of the gricvant's record that must be taken into account here. Accordingly a reinstatement as set forth above will be ordered.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant shall be reinstated to his former position with the State of Iowa DNR within 10 business days of this Award without back pay or accrued contractual benefits.

Dated: June 18, 2010

Jeffrey W. Jacobs, arbitrator

State of Iowa DNR and State Police Officers Council award.